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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 730

HOUSTON BELT & TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, FORT WORTH AND DENVER RAILWAY COMPANY, GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and TEXAS & NEW ORLEANS RAILROAD COMPANY,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division.

JURISDICTIONAL STATEMENT.

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Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and TEXAS & NEW ORLEANS RAILROAD COMPANY,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Southern District of Texas, Houston Division, dismissing a complaint brought to set aside an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Southern District of Texas, Houston Division, is reported in 153 F. Supp. 3. The opinion of the Interstate Commerce Commission is reported as *Houston Belt & Terminal Railway Co. v. Texas & New Orleans Railroad Co.*, 298 I. C. C. 221. Copies of the opinion of said Court, and of the Interstate Commerce Commission, are attached hereto as Appendix A.

JURISDICTION.

This suit was brought under 28 U. S. C., Section 1336, 1398, 2284 and 2321-2325, inclusive, 62 Stat. 931, 936, 968-970, to enjoin and set aside an order of the Interstate Commerce Commission. The opinion of the District Court was filed July 29, 1957; a motion of appellants for a new trial was filed August 19, 1957; and an order overruling that motion, and the final judgment of the District Court, were entered on September 23, 1957. The notice of appeal was filed in that court on November 21, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C., Section 1253, 62 Stat. 926; and the following decisions sustain such jurisdiction: *Mitchell v. United States*, 313 U. S. 80 (1941); *United States v. Champlin Refining Co.*, 341 U. S. 290 (1951); *American Trucking Association, Inc., v. United States*, 344 U. S. 298 (1953).

STATUTES INVOLVED.

Appellants' complaints before the Commission and the District Court brought into issue the construction and application of the following provisions of the Interstate Commerce Act: Section 1, paragraphs (4), (10), (11) and (14 (a)); Section 3, paragraph 4; 54 Stat. 899, 41 Stat. 476,

41 Stat. 476, 54 Stat. 899 and 54 Stat. 902, respectively; 49 U. S. C., Section 1 (4), (10), (11), (14 (a)), Section 3 (4).

The decisions of the Commission and the District Court also bring into issue the application of Section 15, paragraph 6 of the Interstate Commerce Act, 41 Stat. 486; 49 U. S. C., Section 15 (6). The pertinent texts of the foregoing paragraphs are set out in Appendix B.

QUESTIONS PRESENTED.

1. Does the Interstate Commerce Commission under Section 1, paragraphs (4), (10), (11) and (14 (a)), and Section 3 (4), of the Interstate Commerce Act have jurisdiction to determine that it is unreasonable, unjust or otherwise unlawful for appellee Texas & New Orleans to fail and refuse to deliver to appellants, in their train yards, freight and freight cars moving in interchange from said appellee to appellants; and does the Commission have jurisdiction to require said appellee so to deliver such freight and freight cars, assuming that it finds the failure of said appellee to do so to be unreasonable, unjust or otherwise unlawful under said Act? Is the fact that other carriers throughout the country make such delivery on to rails of their connections, either directly or by bearing the charges, evidence that the failure of Texas & New Orleans so to make delivery here is unjust and unreasonable?

2. Does the fact that there are in effect between appellants on the one hand and appellee Texas & New Orleans on the other, certain through rates and divisions thereof on the traffic interchanged, bring this case within 15 (6) of the Interstate Commerce Act and the holding in *Baltimore & O. R. Co. v. United States*, 277 U. S. 291 (1928), so that relief may not be granted in the absence of evidence that the existing divisions are unreasonable, even though the only relief sought by appellants relates to the

performance of interchange service and involves no change in the divisions themselves?

3. If this case would otherwise be within Section 15 (6) and the holding in *Baltimore & O. R. Co. v. United States*, 277 U. S. 291 (1928), would that effect be avoided by the fact, if it were found to be a fact, that the divisions in question were not made on the basis of, or with any reference to, the interchange practices between appellants and appellee on the traffic involved?

4. Was it competent for the District Court to find, in support of the Commission's order, that there was ample evidence that in fixing divisions terminal costs inevitably are evaluated and that in fixing the divisions here, appellants knew of and presumably weighed such costs, when the Commission in its report ignored the testimony on these points and made no findings on them?

5. Do the contracts made in 1912 and 1950 between appellants (or their predecessors) and Texas & New Orleans, notice of termination of which was given by appellants in 1953, effective the first of 1954, control the interchange between the parties and preclude the Interstate Commerce Commission's ordering the establishment of different arrangements?

STATEMENT.

Appellants and appellee Texas & New Orleans are common carriers by railroad and are subject to the provisions of the Interstate Commerce Act. Their lines connect at Houston, Texas; they maintain via Houston through routes on traffic moving between points on their respective lines and they there interchange between them traffic so moving. At a large terminal like Houston such interchange requires transfer (switching) of cars between the train yards of the participating roads.

Texas & New Orleans maintains and operates in Houston one train yard, its Englewood Yard, through which are handled cars interchanged by it with all the other Houston railroads. There are two corresponding yards owned and operated by appellants: South Yard, owned, and operated by appellant Houston Belt & Terminal Railway Co., through which are handled all cars interchanged by or with appellants other than Missouri Pacific; and Settegast Yard of the latter, through which are handled all cars interchanged by or with it. The actual switching or transfer of cars for or on behalf of all appellants is performed for them by appellant Houston Belt & Terminal Railway Co., a terminal carrier which is owned by the other appellants and acts as their agent in the performance of terminal service in Houston.

The traffic involved in this case is traffic handled between Englewood Yard on the one hand and South Yard or Settegast Yard on the other; and it includes cars moving from Texas & New Orleans to the appellants, and vice versa. The appellants deliver to Texas & New Orleans in its Englewood Yard traffic they have to be interchanged to that line; but Texas & New Orleans does not deliver to appellants in their yards traffic to be interchanged to them. It requires that appellants pick up such traffic or cars in Englewood Yard and transfer such traffic or cars to their own yards. Thus in order for the interchange of traffic and the continuous movement of freight to be maintained, appellants are required to perform all of the transfer or interchange service.

Originally this interchange was an "intermediate" one. In 1912 appellants and Texas & New Orleans (or their respective predecessors) established Englewood Yard as a point of interchange on traffic moving between them. At that time Englewood was not a train yard; it was a storage yard intermediate between several train yards of Texas & New Orleans (or its predecessors) and appellants' then

single train yard. In carrying out the interchange, then, each carrier handled between Englewood and its train yard cars interchanged by or with it; and each bore its part of the interchange work. Shortly after this arrangement was made, however, Texas & New Orleans expanded Englewood and made that yard its sole train yard at Houston. Englewood ceased to be an intermediate point between appellants and Texas & New Orleans and the interchange became one from yard to yard. The character of the interchange, as originally agreed upon, was thus changed. Appellants became required not only to deliver to Texas & New Orleans, in its yard, cars moving from them to it, but to go to its yard to get cars moving from it to them.

Appellants from time to time protested this and in 1929 filed a complaint which was dismissed by the Commission in *Houston Belt & Terminal Ry. Co. v. Texas & N. O. R. Co.*, 168 I. C. C. 260 (1930). It was a fair inference from that decision that further complaint would be unavailing until there was a change in the factual situation or in the Commission's conception of a terminal line like Belt; which was, at the time, that such a line could not operate simply as an agent of its proprietors, as Belt was operating, but had to publish tariffs and operate in effect as an independent, intermediate line. The Commission reversed itself on this in 1946 when it decided *Terminal Allowance at Minnesota Transfer*, 268 I. C. C. 5, the effect of which was to approve Belt's agency operation; and a change in the fact situation occurred in 1953, when Texas & New Orleans decided on an expansion of its Englewood Yard. This, among other things, necessitated the removal of the interchange or transfer track and the establishment of new interchange arrangements. But a demand by appellants for a new (and more equitable) arrangement was rejected by Texas & New Orleans, with the consequence that appellants gave formal notice of the termination of the 1912

agreement, effective January 1, 1954, and shortly thereafter filed their complaint before the Commission.

That complaint sought an order requiring Texas & New Orleans to perform its share of the interchange work by delivering to appellants in their yards cars to be interchanged to them, just as they deliver to Texas & New Orleans cars for interchange to it. No complaint was made of the rates or divisions and the only change sought was in the physical handling of the cars. This is emphasized for reasons which appear later.

After hearing Division 3 of the Commission entered its report and order dismissing the complaint, and a timely petition for reconsideration by and reargument before the entire Commission was denied. In so disposing of the complaint the Commission made no findings on the merits. It based its holding on a supposed want of jurisdiction resulting from the following conclusions: that in effect appellants were seeking a change in divisions of the through rates between them, and since they had adduced no evidence of the nature required by Section 15 (6), there was an absence of jurisdiction, under the decision in *Baltimore & O. R. Co. v. United States*, 277 U. S. 291 (1928), to grant them relief; that it had no jurisdiction to grant the relief which appellants sought because of the decision in *Peoria & P. U. R. Co. v. United States*, 263 U. S. 528 (1923); that the matters complained of "were outside the purview" of paragraphs (10) and (11) of Section 1 of the Interstate Commerce Act. The court below sustained the Commission on the first of those grounds.

THE QUESTIONS ARE SUBSTANTIAL.

The decision of the Commission, affirmed by the District Court, constitutes a sweeping renunciation or disavowal of the Commission's power over the interchange of cars between connecting railroads.

The pertinent provisions of the Interstate Commerce Act were plainly intended, and their language is effectual, to confer broad power in the Commission in regard to such interchange. Section 1 (10) defines "car service" as including the interchange of cars; Section 1 (11) prohibits and declares unlawful every unjust rule, regulation and practice with respect to car service; and Section 1 (14) (a) empowers the Commission to establish and enforce reasonable rules, regulations and practices with respect to car service. Thus unjust and unreasonable regulations and practices in the interchange of cars are made unlawful, and the Commission is empowered and required to establish and enforce just and reasonable regulations and practices in such interchange.

The substance of these provisions has been in the Act since 1910. The Commission and the courts have not infrequently had occasion to deal with them; and, aside from the instant case and the 1930 one involving the same controversy and mentioned above, the effect to be given those provisions has always been deemed clear. Very shortly after the car service provisions were added to the Act, the Commission said they empowered the Commission to require the carriers to make reasonable car service rules as between themselves and shippers "and as between each other." *Missouri & Illinois Coal Co. v. I. C. R. R. Co.*, 22 I. C. C. 39, 46 (1911). Of its decision in that case the Commission in its Annual Report for 1916 said it there held that carriers are required to make reasonable rules and regulations with respect to interchange of cars, and that when they fail in that respect "the Commission has authority to determine the individual or joint regulation or practice that is just, fair and reasonable" (70-1). In repeated subsequent opinions it announced the same view: see, for example, *Chamber of Commerce of Newport News v. S. Ry. Co.*, 23 I. C. C. 345, 357 (1912); *Doran & Co. v. N. C. & St. L. Ry.*, 33 I. C. C. 523, 530 (1915); *Omaha*

Grain Exchange v. G. N. Ry. Co., 47 I. C. C. 532, 539 (1917); *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I. C. C. 351 (1935).

In the much-litigated "Seatrain" matter, one of the principal issues was whether objecting railroads were required to deliver their cars to the "Seatrain" line, which loaded them on specially constructed ocean-going vessels and carried them on such vessels between New York City and Gulf ports. The Commission held that the railroads were under that obligation in instances where through routes were involved, and it struck down a rule which would have prohibited such interchange. *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, 340-1 (1935). Sustaining the Commission, this court in *United States v. Pennsylvania R. Co.*, 323 U. S. 612 (1945), said it had been long held that railroads may be compelled to establish through routes and to interchange cars with each other upon reasonable terms. In a subsequent phase of the same controversy, the Court of Appeals for the Third Circuit held that the "plenary" power of the Commission with respect to the interchange of cars among the railroads was "clear." *Seatrain Lines v. Pennsylvania R. Co.*, 207 F. 2d 255 (1953). That it was indeed the intention of Congress to give the Commission "plenary" power in this regard is clear; that precise characterization of the conferred power was used in the Pomerene Report on the 1917 amendment to the car service provisions of the Act. Sen. Rep. 42, 65th Cong., 1st Session, Vol. 1; 7249.

2. The Commission has many times found that there is a generally recognized obligation on the part of forwarding carriers on through traffic to make delivery to their connections, see for example *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I. C. C. 351, 359 (1935); and there was abundant evidence to that effect here. The Commission here did not go into that question and made no findings on the merits. It based its decision primarily,

and the District Court sustained it exclusively, on a supposed want of jurisdiction resulting from *Baltimore & O. R. Co. v. United States,* 277 U. S. 291 (1928). Properly understood though that decision is wholly irrelevant to the instant controversy..

That case involved the cost of trans-river transfer service between St. Louis and East St. Louis on traffic moving through those points. The service was performed for the line-haul railroads, the litigants, by Terminal Railroad Association; which, as a common carrier, charged those roads regular published rates. Originally the west-side railroads (the complainants before the Commission and the appellees in this Court) had found themselves forced to absorb those charges for competitive reasons. Later they attempted to absolve themselves, by their complaint to the Commission, from payment of these charges on westbound traffic, on which the east-side lines had the responsibility of delivery. They did not seek any change in the handling of the traffic. All they sought was the payment by the defendant east-side lines (to Terminal Railroad Association) of the river-crossing charges on westbound traffic; and that was all the Commission ordered.

To clarify the intended effect of that order, as to which the Commission and the District Court were both badly confused, let us examine an illustration based on rates and divisions actually then in effect. At that time the rate on iron and steel articles from Pittsburgh to Oklahoma City via the St. Louis gateway was $1.02. Of this the east-side lines received 35.5¢ and the west-side lines 66.5¢. However, the west-side lines paid the river-crossing charge of 3.1¢, leaving them an actual share or division of 63.4¢. The Commission's order was that the east-side lines pay the crossing charge; and that would have reduced their division from 35.5¢ to 32.4¢ and correspondingly increased the west-side lines' division.

The order was thus clearly erroneous, because under Section 15 (6) changes in divisions may not be required without consideration of the evidentiary factors specified in that section; whereas the case had not been treated by the complainants, or by the Commission, as a divisions case, and evidence required by that section had not been adduced or considered. But the ruling and the principle are simply inapplicable where no change in divisions is sought or ordered.

The District Court here said, though (153 F. Supp. 8) that "*Baltimore*" was decided as it was because "a change in the divisions was the necessary impact of the order," which is true; and (153 F. Supp. 9) that the type of order sought here "could not but have precisely the same effect as that condemned in *Baltimore*"—which is demonstrably untrue. The order condemned in *Baltimore* dealt with the payment of money and would have changed the respective divisions. The order sought here would affect only operations, would involve no payment of money, and would have no effect whatever on divisions.

"Division" as used in railroad parlance and in the statute, is a term of art with a specific well-understood meaning. It does not mean the service performed by a carrier on an interline shipment, and it does not mean the net profit received by the carrier from such a shipment. It means the share or portion of the gross revenue which a line receives out of the through rate. Cf. *Akron, C. & Y. R. Co. v. United States* (*New England Divisions Case*), 261 U. S. 184, 187 (1923). And whatever those shares are in this case, as between appellants and appellee Texas & New Orleans, they would remain exactly the same if the relief sought by appellants were granted. To say that the order sought here would have the same impact as the one condemned in *Baltimore* is obviously to say what is not true.

This is the precise situation which the Commission had before it in a case which it decided after *Baltimore* and after the first of these Houston cases, and in which it agreed with the view which appellants here urge. In *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I. C. C. 351 (1935), the complainant was being required by the defendant to perform all of the switching service on traffic interchanged between the two; and in exactly the manner in which appellants are required to do that here, by switching cars both to and from defendant's train yard. It sought an order, like the one sought here, requiring the defendant to make its own deliveries from its train yard to that of complainant. The complaint did not seek any change in divisions, but it sought to have defendant required to perform more service, and the effect on defendant's divisions would have been exactly the same as the supposed effect on "divisions" here. Yet the Commission said at the outset of its opinion: "Rates, charges or divisions are not in issue; nor would any rates, charges or divisions be changed if the practice complained of were modified" (l. c. 351); and it proceeded to consider the case, carefully, on the merits. It is of course irrelevant here that, on the merits, the complaint was dismissed.[1] It is significant, and highly so, that the Commission referred to the finding it had made in its decision in *Baltimore* as to the obligation of a forwarding carrier to make delivery to its connections, and observed "what was there said was not criticized by the Supreme Court when it condemned the order in that case in *Baltimore & O. R. Co. v. United States*, 227 U. S. 291." (213 I. C. C. 359)

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[1] That joint rates and divisions were involved in the case does not expressly appear from the report. However, the Commission had long before, in 1927, prescribed joint rates for general application for all the southwestern railroads; and those rates had been made generally effective in 1928. See *Consolidated Southwestern Cases*, 123 I. C. C. 203 (1927), 183 I. C. C. 405, 406 (1932). Joint rates being in effect, divisions necessarily were.

3. The District Court here wholly failed to understand, and the Commission failed to appreciate, that interchange is merely an incident, and a minor one, of the handling of through traffic, the traffic on which divisions apply. It is at most only one of the factors which may enter into the determination of divisions and it is not a factor which is required to be taken into account. The quantum of service rendered by a carrier—what the statute calls "mileage haul"—is a factor which can be ignored. *New England Divisions Case*, 62 I. C. C. 51, 56 (1921). On the other hand, those factors which are required to be taken into account are not such as have any bearing on the reasonableness of interchange practices. For example, under the statute and under principles established by the Commission, an originating line may be entitled, since it bears the cost of generating the traffic, to a relatively higher division than an intermediate carrier. But whether a given car being interchanged was originated by the forwarding carrier, or received by it from another, is totally irrelevant to the question of who, as between the forwarding carrier and the receiving one, should perform the interchange. The interchange service is precisely the same regardless of where a car originates.

The District Court and the Commission entertained some notion that after considering evidence like that in a divisions case, the Commission might suitably alter the interchange arrangements.[1] On such a theory the Commission might, for example, conclude (on principles mentioned above) that on a car which it had originated Texas & New Orleans should be relieved of the interchange burden; but that on another car, received from another line, it should perform the interchange. Would Texas & New Orleans

[1] Thus the court said that if appellants' divisions are unfair, this must be shown "either so a new division will be made or the interchange arrangement altered." 153 F. Supp. 9. The same notion is implicit in the Commisson's opinion.

then be permitted to make delivery of the first car in Englewood and required to transfer the other to South Yard? Again, on some commodities the Commission might order Texas & New Orleans to perform the service and on other commodities the appellants to do so, regardless of where the traffic originated. Should the interchange obligation then be split up, in accordance with the point of origin or the commodity carried, or some other consideration wholly irrelevant to interchange?

Nothing but operational chaos could result from any such attempted application of *Baltimore*. A hundred cars might await interchange without its being known what carrier would handle them until a check had been made, car by car, to determine where the interchange obligation lay. In applying the *Baltimore* ruling to its own facts, no such problem of course would be encountered. Since only the payment of money would be involved, the proper adjustments could be made in the ordinary course of interline settlements as in the case of other divisions adjustments.

Since a change in interchange service in a case of this sort would not affect the divisions themselves, a problem arises only if the amount of service required in the performance of additional interchange so far lessens a carrier's profits from existing divisions as to make those inequitable. But if that occurs the carrier imposed upon has its remedy under 15 (6). As the Commission in an earlier case pointed out, its power over interchange arrangements "is not circumscribed or limited because in the exercise thereof the matter of divisions incidently may be affected. If readjustments in divisions shall be sought as a result of the present [interchange] case, steps may be taken to that end." *Peoria & Pekin Union Ry. Co.*, 93 I. C. C. 3 (1924).

The principle announced by the Commission and the District Court could not be logically limited to the kind of sit-

nation presented by this case. Under Section 1 (21) of the Act the Commission has power to require carriers to provide themselves with additional facilities, and to extend their lines, for the purpose of performing car service. But any such extension of line or construction of additional facilities, would affect "divisions" in precisely the same manner as an order of the kind sought here—i. e., by reducing, even if infinitesimally, the net profit from existing divisions. It would logically follow, if the judgment here is affirmed, that the Commission could not exercise such power under Section 1 (21) without conducting a divisions investigation and entering a divisions order.

The question thus presented is substantial and important. If the law is as declared below, the interchange and car service provisions will have been largely read out of the Act. The result will be that once a point of interchange has been established, and through rates established over it, there will be no power, with a minor exception, to change the point or the arrangements, except in consequence of a full-fledged divisions case. The door would be open to entirely unjust and unreasonable interchange practices, with no practical recourse to the carriers suffering.

In making their case before the Commission, appellants, declining to embark on a divisions controversy, sought to illustrate that no divisions issue was involved by presenting evidence that in fact the divisions here had never been made with reference to the manner in which this interchange was performed. The Commission in its report ignored this evidence and this point. The District Court considered this point; and concluded, on its own, that there was ample evidence that in fixing divisions terminal costs inevitably are evaluated, and that here appellants knew of and presumably weighed such costs. Whether it was competent for the District Court so to make its own findings, absent findings by the Commission, *Riss & Co.*

v. United States, 100 F. Supp. 468, aff'd 342 U. S. 937 (1952), is a question of substance and importance.

This case is, so far as the courts are concerned, one of the first impression. It involves an attempted extension of the *Baltimore* case beyond the facts, beyond the principle, and beyond the common sense of that decision. It is important to the railroads and also to the public, which has its own interest in the prompt movement of freight and adequacy of car service, not to speak of just and reasonable railroad practices.

Respectfully submitted,

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APPENDIX A.

In the United States District Court
For the Southern District of Texas,
Houston Division.

Houston Belt & Terminal Railway Company; Missouri Pacific Railroad Company; Chicago, Rock Island & Pacific Railroad Company; Fort Worth and Denver Railway Company; and Gulf, Colorado & Santa Fe Railway Company,
Plaintiffs,
vs.
United States of America and Interstate Commerce Commission,
Defendants,
Texas and New Orleans Railroad Company,
Intervenor.

Civil Action No. 10,434.

Before Brown, Circuit Judge, Connally and Ingraham, District Judges.

Brown, Circuit Judge:

Brought under 28 USCA 1336 and 28 USCA 2321-25; this action seeks to set aside an order of the Interstate Commerce Commission dismissing a complaint by the plaintiffs here against Texas & New Orleans Railroad Company (intervenors here). The complaint before the Commission was directed to the manner of effecting the interchange of railroad freight cars in Houston, Texas, between the plaintiff lines owning Houston Belt & Terminal Railway Company (Belt) and T&NO. The arrangement under attack

was established by contract and provided for interchange of cars at Englewood yard in the immediate vicinity of a principal intersection of the lines involved.

The sole question presented is whether the Commission's order of dismissal, Houston Belt & Terminal Ry. Co. et al. v. Texas & New Orleans R. Co., 298 I. C. C. 221, was proper.

The following very briefly summarizes such facts as are necessary for the disposition we deem proper to the case. Belt is a common carrier by railroad subject to the Interstate Commerce Act. Organized in 1907 as a joint venture of the other plaintiffs,[1] Belt was to and does perform the terminal services of its owning lines at Houston, Texas. Intervenor T&NO since 1934 has owned and operated all the railroad properties previously comprising the Southern Pacific Lines[2] serving Houston.

Until 1912, with minor variations, interchange of cars between Belt's lines and T&NO lines was made to and from their respective yards. These yards were located at various points in and around the City of Houston. On May 12, 1912, largely at Belt's suggestion and apparently because of the increasing growth and resulting traffic congestion within the center of Houston, Belt entered into a contract with T&NO establishing as a transfer or interchange point Englewood Yard, owned by T&NO, and prior to this time

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[1] With various changes since 1907, these now are: Missouri Pacific Railroad Company; Chicago, Rock Island & Pacific Railroad Company; Fort Worth and Denver Railway Company; Gulf, Colorado & Santa Fe Railway Company. Missouri Pacific is present successor in title of four other lines. Belt's services are not rendered on the basis of published tariff rates, but by the payment of the using lines on a user basis, of the actual cost of the service rendered for each of them.

[2] These were, in addition to T&NO: Houston and Texas Central Railway Company; Houston East & West Texas Railway Company; Galveston, Harrisburg & San Antonio Railway Company; The San Antonio and Aransas Pass Railway Company.

used for the storage of obsolete and abandoned equipment. The contract, expressly stating that the parties desired to construct an interchange or transfer track at Englewood immediately adjacent to the intersection of the "respective main tracks of the parties" provided that each party would provide right of way and construct specified portions of the interchange and connecting track,[3] and each would be responsible for the movement of cars destined for the other lines from their respective trainyards to the Englewood interchange.[4] The track was constructed and cars were thereafter exchanged at Englewood.

About this time T&NO, in accordance with its plan, undertook to develop Englewood into its primary trainyard. This work began in 1913 and was completed at a cost of $600,000 in time for the move to be effected late in 1914 and early 1915. And here we arrive at the rub of the case. For now, instead of T&NO having to move, see note 4, supra, its cars several miles to and from Englewood interchange and its various yards, it had to make no movement for its trainyard and the interchange were right together. Of course Belt still had the movement to and from Englewood interchange and Belt's yards. While this left Belt just exactly as it was before and imposed no new burdens on it, Belt, with a sort of reverse of sauce for goose and gander, now began to feel, if not sound, its

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[3] In practice, the actual interchange was always effected in the Englewood Yard since the track constructed under the contract, although used by Belt as a running track in going to and from Englewood Yard, was not of sufficient length or capacity to permit actual interchange.

[4] For example: T&NO had to move all Belt destined cars from T&NO's Hardy St. Yard to Englewood interchange; conversely, it was up to T&NO to pick up at Englewood interchange and move to its Hardy St. Yard all cars destined for T&NO which Belt had delivered from its yards to Englewood interchange. The reverse was true for Belt to and from its South Yard and Englewood interchange.

quarter century lament that if Belt had to move cars five miles, so should T&NO.

In 1929, this smouldering feeling of unfairness broke out and Belt filed a formal complaint with the Commission attacking the legality of the arrangement. This complaint, after hearing, was dismissed, Houston Belt & Terminal Ry. Co. v. Texas & New Orleans Railroad Co., 168 I. C. C. 260 (1930), on the authority of Baltimore & Ohio Railroad Co. v. United States, 277 U. S. 291, 72 L. Ed. 885.

In 1950 various adjustments occasioned by the placing into operation of the New Missouri Pacific Settegast Yard were made in the interchange arrangement, but retained was the 1912 contract with its basic principle of physical exchange at Englewood.[5] To the obvious query why Belt would so long (1929 to 1950) submit to, and indeed renew (1950) an arrangement it thought so wrong, it suggested on argument that it felt obliged to wait until there was a substantial change in circumstances before again resorting

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[5] The following exchange of memoranda is significant: On April 17, 1950 T&NO's Executive Vice President wrote the President of Belt: "6. Except as modified by this proposal, the existing interchange agreement between T&NO and HB&T, dated the 20th day of May, 1912, shall remain in full force and effect." The President of Belt, on May 26, 1950 wrote: "It has been concluded that the plan as outlined by you is satisfactory to the Houston Belt & Terminal Railway Company and its using lines * * * [T]he method of handling interchanges, as outlined in your memorandum should be made effective as of * * * [June 1, 1950]."

The proposals and counter proposals related primarily to certain operational matters of segregating and spotting cars into blocks. The acceptance above, likewise spelled out that Belt agreed to do the very thing which, four years later, Belt said was a violation of the Transportation Act:

> "1. All cars interchanged between the T&NO on the one hand and the * * * [Belt] and its using lines on the other hand be physically interchanged at the T&NO Englewood yard.
>
> "2. The * * * [Belt] will deliver and receive all such cars in that yard."

to the Commission for relief. It found this, apparently, in 1953. In 1953 T&NO requested approval of a physical rearrangement of the connecting track at Englewood to enable it to carry out its comprehensive plans to convert the yard into a modern gravity type yard at a cost of approximately $6,000,000. Belt, apparently sensing the possibility that this furnished a justification for repudiating the established arrangement, delivered an ultimatum that unless T&NO moved (or paid Belt to do so) the cars from Englewood to Belt's yards (Settegast or South), the existing arrangement would be terminated at a specified date, and the complaint proceeding would be instituted before the Commission. Following T&NO's refusal to agree to the proposed arrangement, Belt filed this complaint February 8, 1954. Subsequently, the parties agreed to shifting the track as requested by T&NO, but with the specific reservation that the agreement would in no way prejudice Belt's claim that the entire existing arrangement was unlawful.

Belt's attack is based principally upon Section 1 (10), (11), and (14a) of the Interstate Commerce Act[6] as amended. Belt insists that in reading these sections to-

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[6] 49 U. S. C. A. 1 (10): "(10) 'Car Service' defined. The term 'car service' * * * shall include the use, control, supply, movement, distribution, exchange, interchange, and return of * * * cars * * *, used in the transportation of property * * * and the supply of trains, by any carrier * * *

49 U. S. C. A. 1 (11): "(11) Duty to furnish car service; rules and regulations. It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful.

49 U. S. C. A. 1 (14) (a): "(14) (a) The Commission may * * * establish reasonable rules, regulations, and practices with respect to car service by * * * carriers * * * and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

gether the result is inescapable that " * * * every unjust and unreasonable rule, regulation and practice * * * " with respect to the interchange of cars is unlawful and consequently the Commission has both the power and the duty to declare the arrangement between Belt and T&NO illegal and order what Belt considers a more equitable arrangement. Belt also relies on Section 3 (1) and (4) of the Act[7] to further illustrate the duty of carriers to establish "reasonable" and "proper" interchange facilities. From this broad basis Belt moves to its second contention that the usual practice in the industry is for the delivering railroad to make delivery of interchange traffic to the rails of their connections. This (according to the Complaint in this Court action) "generally recognized obligation" has received specific Commission recognition[8] and is usually

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[7] 49 U. S. C. A. 3 (1): "(1) It shall be unlawful for any common carrier * * * to make, give, or cause any undue or unreasonable preference or advantage to any particular persons, company * * * or to subject any particular person, company * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U. S. C. A. 3 (4): "(4) All carriers * * * shall * * * afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines * * *."

[8] Kansas City Southern Ry. Co. v. Louisiana & A. Ry. Co., 213 I. C. C. 351, 359. "There is a generally recognized obligation on the part of all carriers on through traffic to make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line, and this is the general practice of railroads throughout the country. We believe this to be a just, fair and reasonable practice for general application."

But the Commission apparently recognizes as well that interchange arrangements are usually governed by agreement between the delivering and receiving lines and the interchange point should normally be as near as practicable to an intersection of the two lines. In Kansas City Southern Ry. Co. v. Louisiana & A. Ry. Co., supra (relied on by Belt), at p. 355: "The general practice

accomplished in one of two ways. The first is termed an "intermediate" interchange under which each carrier delivers and picks up cars at an intermediate point between the two trainyards. The second type of arrangement is called a yard-to-yard interchange under which each carrier delivers cars destined to the other into the trainyard of the other. Under either of these systems (or any one of innumerable variations of each) the expense of interchange is shared by the carriers concerned. Belt insists, however, that in the operation under attack the move by T&NO to Englewood changed the system from intermediate to yard-to-yard, but with the important divergence from the usual yard-to-yard arrangement that Belt was required to perform all of the interchange work. Belt's contention now is that the burden of picking up cars destined for Belt's lines at the Englewood Yard and transporting them to Belt's yard should now be borne by T&NO.

The Commission's decision denying Belt's requested relief set forth several answers to these contentions. First and foremost, as in the prior 1930 proceeding was Belt's nemesis, Baltimore & Ohio Railroad Co. v. United States, supra. While the Commission was of the opinion that allegations of different statutory provisions from those relied on in the 1930 case, 168 I. C. C. 260, supra, rendered res judicata inapplicable, nevertheless, it considered *Baltimore* was as fully controlling in this, as in the former, proceeding. With this reasoning, we are in full accord and need only briefly mention later the other and alternative grounds relied on by the Commission.

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among railroads is to interchange carload traffic in accordance with agreement between the delivering and receiving lines." And in Peoria and Pekin Union Ry. Co. v. United States, 93 I. C. C. 3 at p. 9: "In the interchange of traffic between carriers it is the ordinarily accepted practice for the receiving line to designate tracks within a reasonable distance of the intersection of its rails with those of a connecting carrier * * *."

In *Baltimore* the Supreme Court reversed a Commission order respecting charges for moving certain westbound through traffic from the connecting railroads east of the Mississippi across the river to connecting lines west of the Mississippi. The actual transporting was done by a terminal carrier jointly owned by the west and east side lines. The prior practice was for the west side lines to bear the expenses of moving westbound through cars across the river. The west side lines complained to the Commission, charging that the practice was unjust, unreasonable and illegal. The Commission found the practice to be unjust and unreasonable and ordered it discontinued, i. e., the east side railroads would have to bear the expense of delivering westbound cars to the west side of the river. The Commission's order was affirmed by a statutory three-judge court. But on appeal the Supreme Court reversed and set aside the order. The Court pointed out that the cost complained of had been assumed by the west side lines to enable them to compete with other railroads west of the river who made no charge for the cross-river transfer. No change had been ordered by the Commission in the method for the actual handling of the traffic. The controversy, the Court reasoned, was basically financial, i. e., one of divisions or apportionments of revenues derived from through traffic. The Court stated that the word "practice" as used in the provisions relied [§ 1 (6), (11) and § 15 (1)] on by the west side lines did not include the method used by the connecting carriers for their divisions of rates or revenues.

But the Court went further and held that even if the matter in controversy were a "practice" within the meaning of the Act, the Commission's order was not authorized. This was so since no evidence was produced as to the propriety of divisions between the connecting carriers. "There is a strong presumption that the general level of * * * [the connecting carriers'] * * * rates has been adjusted to include reasonable compensation for the services cov-

ered by them." 277 U. S., at 300, 72 L. Ed. at 891. That evidence tending to show that usually when interchange is effected by means of an intermediate carrier, the delivering carrier bears the cost of switching was not sufficient to invalidate the existing arrangement was made clear by the court, for "* * * [S]uch a practice does not tend to prove that it is unjust or unreasonable for the appellee lines, in order to meet competition of other west side lines, to bear the cost of transfer * * *."

The Court, for there and here, made plain the real nature of the problem:

> "The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in Par. (6) of § 15 relating to the division of joint rates." 277 U. S., at 301, 72 L. Ed. at 891.

With the *Baltimore* obstacle firmly in its path, it is hardly surprising that a good deal of Belt's efforts here are attempts to demonstrate that this case involves different facts, questions of law, issues, and policy considerations. We are unconvinced that the clearly stated principles of that case are not directly applicable to the one at bar.

Belt's principal contention that the cases are distinguishable is that in *Baltimore* the questions were purely *financial* in that no change was sought or ordered by the Commission in the actual handling of the traffic. The only change ordered was that the east side lines were to pay the crossing charges on the westbound through traffic, which, in turn, could only have the effect of changing divisions but without hearing or consideration of the factors required by § 15 (6) of the Act.[9] In contrast Belt insists that here no

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[9] § 15, par. (6): "*Commission to establish just divisions of joint rates, fares, or charges; adjustments.* Whenever, after full hearing upon complaint or upon its own initiative the Commission is of

change in divisions is sought while a change in operations is, i. e., T&NO should merely be required to move the specified cars.

But, of course, this contention will not bear analysis. The Supreme Court did not rely on changes in divisions of revenue having been expressly sought or ordered by the Commission. Indeed, it recognized that such had not been done. It merely reasoned that a change in the divisions was the necessary impact of the order and without evidence of the type required by the Act, note 9, supra, demonstrating that currently established divisions were unreasonable because of the crossing charges, the Commission could not order the east side lines to pay them.

Laying aside the particular wording of the formal prayers for relief, is there any real difference in what Belt is seeking here? Is not the interchange "burden" of which Belt complains merely the expense of transporting these cars? Indeed, Belt itself almost said as much in its brief before the Commission: "Perhaps the most satisfactory arrangement, all things considered, would be for Belt to continue to perform the entire service and be reimbursed by defendant for the transfer from Englewood to complainant's yards, with those yards being the point of interchange to complainants." It is not to seize on what Belt now says

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opinion that the divisions of joint rates, fares, or charges * * * are or will be unjust, unreasonable, inequitable * * * the Commission shall by order prescribe the divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions * * * the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also * * * any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

may possibly have been an unfortunate statement as an admission[10] controlling the case that we, like the Commission, make note of this. It is merely to highlight the fact that the matter in controversy here is basically precisely the same as involved in *Baltimore*.

Nor do we find persuasive Belt's contention that the *Baltimore* case, involving as it did a terminal carrier with required published tariffs for service for its proprietors, should be distinguished from this case since here the Belt operates as an agent for its proprietors under contract without publishing tariffs covering such service. While, as Belt says, the Commission in the 1930 case, 168 I. C. C. 260, supra, may or could have dismissed that proceeding because at that time Belt had no standing as an operating agent and was constructively equivalent to the independent terminal carrier in *Baltimore*, the subsequent change in the Commission's rule, Terminal Allowance at Minnesota Transfer, 268 I. C. C. 5, is immaterial in assaying Commission action in the 1954 case.

Belt, by testimony that since the manner of interchange had never entered into the determination of divisions, con-

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[10] Counsel should feel no responsibility for an unwise argumentative statement. Belt's formal complaint filed before the Commission set forth in plain terms:

> "Complainants believe that an arrangement under which HB&T power and crews would continue to perform the interchange work both ways between the Englewood Yard and the two HB&T yards, acting as agent for T&NO in making the return trips from Englewood Yard with T&NO's cars for delivery on designated interchange tracks in the Settegast and New South yards, where interchange would take place, and payment by T&NO to HB&T of the cost of such return trips, would be the most practicable and satisfactory way of providing for a just and reasonable interchange arrangement."

And, as a matter of fact, in the ultimatum letter of November 16, 1953, Belt laid the ground for both:

> "3. Belt is willing to continue to perform the work of transferring T&NO cars from * * * Englewood * * * to * * * Settegast and South yards of Belt, if T&NO will pay the cost thereof."

tends that this takes the case completely from under the ruling of *Baltimore*. But the Commission was not compelled to attribute to this general testimony the effect advocated by Belt. As we have shown, it is not really the *manner* of interchange, but the *expense* of delivering these cars which is being complained of. As such, an order of the type sought by Belt could not but have precisely the same effect as that condemned in *Baltimore*. There was ample evidence as well that in fixing divisions terminal costs, whether done by tariff charges paid, or costs incurred on a user basis, inevitably are evaluated. In this respect, it mattered not whether Belt's lines consider the *manner* of the interchange, i. e., by Belt's switchers and crews or T&NO's. They certainly knew of and presumably weighed as desired the ascertained monthly pro rata share of Belt's operating costs.

The general negative evidence adduced by Belt is not that required by *Baltimore* in this situation which must be "substantially similar" to that specified in § 15 (6), note 9, supra. The cost of the movement by Belt, of course, is known. Some evidence indicated that it was as much as $100,000 each year. If this is now adequately reimbursed by divisions neither the arrangement nor the 1912 contract, nor the resulting expense is unfair. If it is not, then this must be shown either so a new division will be made or the interchange arrangement altered.

Under the view we have taken of this case, we have assumed *arguendo* a power in the Commission to order modification of interchange arrangements. Consequently, it is unnecessary to discuss Belt's complaint that the Commission was erroneously of the opinion that it was powerless to grant the requested relief even if *Baltimore* did not prohibit it. Citing several cases,[11] Belt contends that the Com-

[11] Missouri & Illinois Coal Co. v. I. C. R. R. Co., 22 I. C. C. 39; Doran & Co. v. N. C. & St. L. Ry., 33 I. C. C. 523; Chamber of Commerce of Newport News v. S. Ry. Co., 23 I. C. C. 345; Omaha

mission's sweeping powers given by the Act over interchange arrangements may accurately be described at the present time as plenary and that only a completely unrealistic reading of Peoria & Pekin Union Ry. Co. v. United States, 263 U. S. 528, 68 L. Ed. 427, would make that case[12] an obstacle to the Commission's authority to act under the cited provisions of the act, note 6, supra. Belt has simply failed to meet the requirements if the power exists.

The Commission's conclusions had ample record basis on evidence and findings after application of proper standards. None of the procedural complaints have merit.

The Order is affirmed and the Complaint dismissed.

Dismissed.

.....
United States Circuit Judge.

/s/ Ben C. Connally,
United States District Judge.

/s/ Joe Ingraham,
United States District Judge.

(Filed July 29, 1957.)

Grain Exchange v. G. N. Ry. Co., 47 I. C. C. 532; Investigation of Seatrain Lines, Inc., 206 I. C. C. 328; United States v. Pennsylvania R. Co., 323 U. S. 612, 89 L. Ed. 499; Seatrain Lines v. Pennsylvania R. Co., 3 Cir., 207 F. 2d 255; Seaboard Air Line R. Co. v. United States, D. C. Va., 131 F. Supp. 129; affirmed 349 U. S. 902, 99 L. Ed. 1239.

[12] Belt states that a careful reading of that case, the legislative history of the cited portions of the statute, and other cases in point conclusively demonstrates that the cited sections, note 6, supra, are applicable to the present fact situation. Among the cases cited: United States v. Pennsylvania R. Co., supra; United States v. Michigan Portland Cement Co., 270 U. S. 521, 70 L. Ed. 713; In the Matter of Service Order 85, 256 I. C. C. 523.

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Interstate Commerce Commission.

No. 31460.

Houston Belt & Terminal Railway Company et al.

v.

Texas & New Orleans Railroad Company.

Decided April 3, 1956.

Refusal of defendant to deliver freight to complainants at a point or points other than the Englewood yard of defendant at Houston, Tex., or to reimburse complainants for transfer of freight from Englewood yard to complainants' yards, found not to be unlawful as alleged. Complaint dismissed.

R. S. Outlaw, L. W. Butterfield, Bruce Dwinell, R. T. Cubbage, Toll R. Ware, George W. Holmes, and C. M. Spence for complainants.

Thormund A. Miller, Stanfield Johnson, Tom M. Davis, and Edward M. Reidy for defendant.

C. H. Smith, A. E. Strelau, John L. Purdum, and W. T. Meredity for Brotherhood of Railroad Trainmen.

Report of the Commission.

Division 3, Commissioners Clarke, Winchell, and Hutchinson by Division 3:

Complainants filed exceptions to the examiner's proposed report and defendant replied. Exceptions and requested findings not specifically discussed in this report or reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on February 8, 1954, it is alleged that the failure and refusal of the defendant to establish just

and reasonable rules, regulations, and practices with respect to "car service" results in violations of section 1, paragraphs 10 and 11, and section 3, paragraphs 1 and 4 of the Interstate Commerce Act. We are asked to enter an order requiring the defendant to cease and desist from such violations; to require the establishment of just, reasonable, and nondiscriminatory rules, regulations, and practices with respect to the interchange of freight cars between the complainants and the defendant at Houston, Tex., and to award damages in such sum as we shall determine the complainants are entitled to. The Brotherhood of Railway Trainmen, representing the affected employees of the various railroads, intervened for the purpose of protecting the rights of employees in the event the present interchange arrangements are altered.

The Houston Belt and Terminal Railway Company, hereinafter sometimes called the Belt, is a common carrier by railroad subject to the Interstate Commerce Act. It was organized in 1907 as a joint venture, by the Gulf, Colorado and Santa Fe Railway Company, the Trinity and Brazos Valley Railway Company, The St. Louis, Brownsville and Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company (the two last named being components of the Missouri Pacific Lines) to perform the terminal services of the owning lines at Houston. Since that time the interest of the Trinity & Brazos Valley has been acquired jointly by the Chicago, Rock Island and Pacific Railroad Company and the Fort Worth and Denver City Railway Company. The International-Great Northern Railroad Company (Guy A. Thompson, Trustee), and the Sugar Land Railway Company, also components of the Missouri Pacific Lines, have since become so-called "user lines." The defendant, Texas and New Orleans Railroad Company, since 1934 has owned and operated all the railroad properties previously comprising the Southern Pacific Lines serving Houston, which included, in addition to the defendant, the Galveston, Harrisburg and San Antonio Rail-

way Company, Houston and Central Texas Railroad Company, Houston East and West Texas Railway Company, and San Antonio and Aransas Pass Railway Company.

The Belt began operations on January 1, 1908. With minor exceptions, it owns and operates all of the freight and passenger terminal facilities used by its tenant lines in Houston and performs all of their terminal services in that city. Its services are not rendered on the basis of published tariff rates, but by the payment by the using lines, on a user basis, of the actual cost of the service rendered for each of them.

From its inception until 1912 Belt's interchange of cars with connecting lines was made to and from their respective yards. The Belt operated its old South yard; the defendant and the Galveston, Harrisburg & San Antonio operated the Hardy Street yard; the Houston East & West Texas its North yard, which was slightly east of Hardy Steet; and the Houston & Texas Central its Chaney yard, which was due west of Hardy Street.

Interchange between the Belt and the defendant-Galveston, Harrisburg & San Antonio from January 1908 to April 1912, was made on an interchange track just north of Tower 26 at the crossing of their respective lines on Mary Street. When cars thus interchanged exceeded the capacity of this track they were placed on the track of the Belt just north of Lorraine Street in the same vicinity. Each delivering line placed its cars on and pulled its cars from the interchange track. Thus, the defendant had to move cars between the interchange track and Hardy Street and the Belt had to move cars between the interchange tracks and South yard.

Interchange between the Belt and the Houston & Texas Central was made on a track on West Street just north of the Buffalo Bayou Bridge, and cars for interchange were switched to and from their respective yards and the inter-

change tracks. Until July, 1911, interchange by the Belt with the Houston East & West Texas was on a track immediately north of Tower 26. On that date the interchange was consolidated with the Houston & Texas Central.

The defendant had a yard for the storage of obsolete and abandoned equipment at Englewood. Houston was then entering upon an era of rapid growth and the railroads were planning to remove their operations from the center of the city. In 1911 the Belt had completed its new South yard which was located a mile or so south of the old South yard, some distance away from the congestion of the city. At about the same time it completed construction and placed in operation its east Belt Line, which intersected the defendant's main line north and east of Englewood.

Presumably due to the increasing growth and resultant traffic congestion within the center of Houston, in the late summer or early fall of 1911, negotiations were entered into which resulted in an agreement on May 12, 1912, between the defendant and the Belt, and which recited, among other things, "that whereas the main tracks of the parties hereto intersect and cross at a point about one mile East of the East City Limits of Houston in Harris County, Tex., and about 600 feet East of the Texas Company's East switch at Englewood where the said parties now desire to construct, maintain and operate an interchange or transfer track, this to connect their respective tracks for the purpose of transferring or interchanging cars." It provides that the defendant would construct the part of the track extending from the connection with its track at Englewood yard to the extreme southern line of its property at Englewood; that the Belt would construct that part of the track extending from the south line of the defendant's property at Englewood to a connection with certain additional tracks to be constructed by the Belt;

that such track should be used for the transfer of business between the parties thereto; that freight upon such transfer track should be considered as for the account of the defendant when it should come over the line of the Belt destined for the defendant, and as for the account of the Belt when it should come over the line of the defendant destined for the Belt. It further provides that in case any disagreement should arise between the parties as to any matter covered by it, upon written request of either party, such disagreement shall be submitted to three arbiters, one to be chosen by each of the parties to the agreement and the other selected by those two. After hearing, the decision of two or all of the arbiters is to be final and binding upon both parties as to such matters submitted for arbitration.

Only such freight as was delivered to the transfer track for interchange was subject to the agreement. At that time, and since, livestock, perishables, and certain other freight requiring expedition was interchanged at the Mary Street and Parr Street intersections.

At a time either prior to or after the agreement of May 12, 1912, the defendant decided to make Englewood its primary trainyard. Work was actually begun in 1913. On November 15, 1914, the defendant and the Galveston, Harrisburg & San Antonio trainyard operations were moved from Hardy Street to Englewood, and the next day the Houston East & West Texas and the Houston & Texas Central interchanges with the Belt were consolidated at Englewood. In February 1915, Englewood was established as the trainyard of all the Southern Pacific System lines in Houston.

Since the transfer track constructed under the May 12, 1912, agreement was embraced within what had subsequently become the defendant's trainyard at Englewood, the Belt, even though its physical operations had not changed, was in effect compelled to go to the defendant's

trainyard to receive cars destined for delivery to the lines of its users.

In June of 1929, the Belt complained to this Commission that the rules, regulations, and practices of the defendant requiring all interchanges of carload freight at Houston between it and the defendant to be made in the defendant's Englewood yard, and to be effected at the sole cost and expense of the defendant, were for the statutory period, and would continue to be, unjust, unreasonable, and unlawful in violation of section 1 of the act. The Commission was asked, among other things, to require the construction and operation of such new or additional interchange connections and facilities as might appear to be necessary, and to award damages in the sum of $50,000.

After stating the reasons for and the operation performed under the contract of May 12, 1912, in somewhat more detail than is recited herein, the Commission, by division 6, in *Houston Belt & Terminal Ry. Co. v. Texas & N. O. R. Co.*, 168 I. C. C. 260, hereinafter referred to as the prior proceeding, dismissed the complaint upon the authority of *Baltimore & O. R. Co. v. United States*, 277 U. S. 291. In the latter proceeding, which concerned the question of whether the east-side lines or the west-side lines should absorb the charges of the Terminal Railroad Association of St. Louis for the transfer of westbound through traffic from East St. Louis, Ill., to St. Louis, Mo., the Commission had found, in view of the fact that ordinarily when interchange is effected by an interchange carrier the delivering carrier bears the cost of switching, that the practice of the east-side lines in requiring the west-side lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis would be unreasonable, and that the just and reasonable practice would be for the east-side lines to absorb such charges. The Supreme Court, in reversing the District Court which had

dismissed a suit to set aside the Commission's order, stated:

> The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in paragraph (6) of section 15 relating to the division of joint rates. The case was not presented by complainants or considered by the Commission on that basis. There was no evidence to show the amount of revenue required to pay the operating expenses, taxes, and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of transfer of the westbound through traffic.

In dismissing the complaint in the prior proceeding, division 6 said:

> Evidence of the character declared by the Supreme Court in that case to be indispensable is wholly lacking in this record.

There were other reasons given for the dismissal, but obviously they were ancillary to the finding that evidence declared to be indispensable by the Supreme Court was wholly lacking.

The complainants here would distinguish the earlier proceeding from the present one by reference to *Terminal Allowance at Minnesota Transfer*, 268 I. C. C. 5, wherein the Commission found that a terminal carrier may validly operate under contract as agent for its propriety lines without the necessity of publishing tariffs covering such service. We do not agree. In *Baltimore & O. R. Co. v. United States*, supra, no point was made of whether or not the Terminal Railroad was acting as agent for its proprietors or for itself, or whether or not it should publish tariffs covering its services for its proprietors. As stated,

in the prior proceeding the division found that "a somewhat similar situation was considered by the Supreme Court" and that evidence of the character declared by the Supreme Court to be indispensable was wholly lacking. The question as to agency was discussed therein after it had been determined that the complaint should be dismissed.

In the prior proceeding operating officials of the Belt contended that there should be a yard-to-yard interchange between the South yard and the Englewood yard, the Belt and the defendant to perform the service during alternate months, or, if preferable to the defendant, one carrier to perform the service continuously and be reimbursed by the other. Substantially the same solution is advocated herein, except that the Belt is to perform the entire service and be reimbursed by the defendant for the transfer of cars to and from Englewood yard.

Although the factual situation here is similar to that in the former proceeding, the allegations of law violations are somewhat different, and for that reason the doctrine of *res adjudicata* is inapplicable. In the former proceeding it was alleged that the rules, regulations, and practices of the defendant with respect to interchange at Houston were unjust, unreasonable, and unlawful in violation of section 1 of the act. Here, there are specific allegations of violations of paragraphs 10 and 11 of section 1 and paragraphs 1 and 4 of section 3 of the act.

With respect to paragraphs 10 and 11 of section 1, in a proceeding brought by the States of Wisconsin and Michigan to determine whether or not the Commission had jurisdiction to require the operation of additional passenger service between points in Wisconsin and points in Michigan, *Wisconsin R. R. Commission v. C. & N. W. Ry. Co.*, 87 I. C. C. 195, the Commission stated:

> In support of their contention that we have jurisdiction in such cases, defendants rely largely upon

paragraph (10) of section 1 of the Interstate Commerce Act, as amended by the transportation act of 1920.

* * * * * * *

It seems clear that paragraph 10 of section 1 was enacted to enable us to facilitate and expedite the movement of property.

In *Peoria Ry. Co. v. United States*, 263 U. S. 528, the Court said:

> The argument that the authority of the Commission over car service should be construed to include the requirements of switching rests upon paragraph (10) of amended section 1 of the act to regulate commerce. But "car service" connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are instrumentalities. To make these instrumentalities available *in emergencies* to a carrier other than the owner was the sole purpose of subparagraphs a, b, and c (of section 1, paragraph 15). It is to this end *only* that provision is made by paragraph 10 for the "movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property."
>
> Moreover, switching service differs in character from those as to which such power is expressly granted. The switching order here in question compels the performance of the primary duty to receive and transport cars of a connecting carrier. That Courts may enforce such duties by a mandatory injunction including a preliminary restraining order has long been recognized.

From the foregoing it seems clear that the matters complained of herein are outside the purview of paragraphs 10 and 11 of section 1.

By specific terms, the provisions of section 3 (1) are inapplicable to carriers. Section 3 (4) provides, in substance, that all carriers shall afford reasonable, proper, and equal "facilities" for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering property to and from connecting lines. The nominal issue here is not that the defendant is not furnishing reasonable, proper, or equal facilities for the interchange of traffic at Englewood, but that such facilities are not properly located.

The real issue in this proceeding is purely financial. Thus, the complainants conclude their brief with the following:

> * * * If there were nothing more to the case than the unexplained fact that complainants are required to bear the entire cost of the transfer service, the right to relief would be unquestionable. But what more is there? In substance, nothing; * * *
>
> Perhaps the most satisfactory arrangement, all things considered, would be for Belt to continue to perform the entire service and be reimbursed by defendant for the transfer from Englewood to complainants' yards, with those yards being the point of interchange to complainants.
>
> Defendant, however, has persistently refused to consider any such arrangement and the only recourse is requirement that it make delivery into complainants' yards.

This record would not support a finding that defendant's refusal to make delivery to complainants at their respective yards of freight destined for them violates section 1 (10) and (11) or section 3 (1) and (4) of the act.

As in the prior proceeding, this record does not contain any evidence which would indicate that the division of revenues received by the complainants from the joint rates

is unreasonable nor that the divisions received are not adjusted or are insufficient to cover the cost of transfer by the Belt.

The contract of May 12, 1912, under which the present transfers are made, is one between private parties, the natural effect of which, as carried out, does not, directly or as a mere incident to other purposes, regulate or purport to regulate to any extent interstate commerce. So far as this record is concerned, the public has no interest in its application, and it was entered into at a time when it was necessary to complainants' business. The cost incurred by the defendant in fitting Englewood yard for the interchange of traffic was not inconsequential. After accepting the benefits of the contract for many years, the complainants now seek an order from us which would in effect prohibit the defendants from requiring further performance from the Belt under it.

The complainants argue that refusal of the defendant to bear a fair share of the interchange burden is contrary to the virtually uniform practice of carriers, and is unreasonable and unlawful. Without giving any significant definition to the word "practice", the fact that other carriers throughout the country may make delivery on rails of their connections, either direct or by bearing the charges, does not tend to prove, *without evidence*, that it is unjust and unreasonable for the defendant to require the complainants to bear the cost of transfer in both directions. See *Baltimore & O. R. Co. v. United States*, supra.

The complainants argue also that the contract of May 12, 1912, is of no force or effect by virtue of new interchange arrangements made under another contract dated September 22, 1954. The latter agreement was made to cover a change in the location of the track connecting the Belt's line and Englewood yard, occasioned by the ex-

pansion of the yard. The designation of the yard as the point of interchange was not affected.

We find that the refusal of the defendant to make delivery of freight to the complainants at a point or points other than Englewood yard of the defendant at Houston, or to reimburse the complainants for the transfer of freight from Englewood yard to complainants' yards, is not shown to be unlawful as alleged. The complaint will be dismissed.

Commissioner Winchell, being necessarily absent, did not participate in the disposition of this proceeding.

Order.

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office in Washington, D. C., on the 3rd Day of April, A. D. 1956.

No. 31,460.

Houston Belt & Terminal Railway Company et al.

v.

Texas & New Orleans Railroad Company.

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, division 3.

Harold D. McCoy,
Secretary.

(Seal)

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 12th Day of September, A. D. 1956.

No. 31,460.

Houston Belt & Terminal Railway Company et al.

v.

Texas & New Orleans Railroad Company.

Upon consid ration of (1) the record in the above-entitled proceeding, (2) petition of complainant for reconsideration and oral argument, (3) reply of Texas and New Orleans Railroad Company to complainants' petition, (4) complainants' motion to strike certain statements in subparagraph (b) on page 8 of defendant's reply, and (5) defendant's reply to complainants' motion to strike:

It is ordered, That complainants' motion to strike be, and it is hereby, overruled, for the reason that the matters submitted in support thereof do not present substantial and material grounds to warrant sustaining the motion.

It is further ordered, That complainants' petition for reconsideration and oral argument be, and it is hereby, denied, for the reasons that the findings of fact in the report of the Commission are fully supported by the record, and the conclusions are based on substantial evidence; and that the petition does not show sufficient grounds to warrant reopening the proceeding for reconsideration and oral argument.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX B.

Provisions of the Interstate Commeree Act, as amended, Title 49, United States Code:

Section 1 (4)—54 Stat. 899:

"It shall be the duty of every common carrier subject to this part . . . . to establish reasonable through routes with other such carriers . . . It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation."

Section 1 (10)—41 Stat. 476:

"The term '*car service*' . . . . shall include the . . . *interchange*, . . . *of* . . . *cars*, and other vehicles used in the transportation of property, . . . "

Section 1 (11)—41 Stat. 476:

"It shall be the duty of every carrier by railroad . . . to furnish safe and adequate *car service* and to establish, observe, and enforce just and reasonable rules, regulations and practices with respect to *car service;* and every unjust and unreasonable rule, regulation, and practice with respect to *car service* is prohibited and declared to be unlawful."

Section 1 (14) (a)—54 Stat. 899:

"The Commission may, after hearing . . . establish reasonable rules, regulations, and practices with respect to *car service* . . . and the penalties or other sanctions for nonobservance of such rules, regulations or practices."

Section 3 (4)—54 Stat. 902:

"All carriers subject to the provisions of this part, shall, according to their respective powers, afford all

reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; . . . ''

Section 15 (6)—41 Stat. 486:

''Whenever, after full hearing upon complaint and upon its own initiative, the Commission is of the opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers parties thereto . . . the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, . . . In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the effect with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers, and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.''